a spiritualist, but it was held valid, principally, upon the theory that while the testator believed in the reality of the revelations, he followed the advice they contained as or not they coincided with his own judgment. See In re Smith's Will, 52 Wis. 643, 8 N. W. 616, 38 Am. Rep. 656.

The conclusion from that case seems to be, that if the testator considers the disembodied spirit as establishing its identity and having the gift of precision and generally of greatly superior intellect to one in the flesh, and for these reasons its revelations ought in conscience to be obeyed, then there would be an insane delusion which would invalidate a will.

In our view it is more logical to regard belief in spiritualism, as was said by Vice-Chancellor Gifford in Lyon *v.* Home L. R. (6 Eq.), 655, as "mischievous nonsense, well calculated, on the one hand to delude the vain, the weak, the foolish and the superstitious, and on the other to assist the projects of the needy and of the adventurer," and that where there is disposition of property, unusual and contrary to the ordinary claims of kinship, as by the accepted standards is recognized, mere belief in spiritualism should make a prima facie case of intestacy."—The Law.

LYNCHBURGH TRACTION & LIGHT CO. *v.* GUILL.

June 13, 1907.

[57 S. E. Rep.]

1. Street Railroads—Injuries to Travelers—Negligence—Pleading.—A complaint against a street railroad company for injuries to a traveler, alleging that defendant so carelessly, etc., managed its cars that by reason of its negligence one of them ran against plaintiff, who was then on the highway, whereupon, etc., was fatally defective for failure to allege the facts from which the negligence arose.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Street Railways, § 224; vol. 37, Negligence, §§ 182-184.]

2. Same—Public Highway—Establishment.—Where plaintiff was injured in a collision with a street car in a highway outside the limits of a city, whether the place where the injury occurred was in fact a public highway must be determined by the law with reference to the establishment of public roads in the country, and not with respect to the dedication and opening of streets in a city.

3. Dedication—Acceptance.—The acceptance of the dedication of a city street may be shown by the acts of the municipality's officers.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Dedication, §§ 70, 83.]

4. Same—Country Highways.—The acceptance of a highway in the country, so as to impose on the public the burden of keeping it in order, must appear by matter of record, either by a formal acceptance or a showing that the county court has laid off a road before used

into precincts, or appointed an overseer or surveyor, for it, thereby claiming the road for the benefit of the public.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Dedication, §§ 70, 75, 83.]

Error to Circuit Court, Lynchburg County.

Action by John Dudley Guill, by John Davis Guill, his father and next friend, against the Lynchburg Traction & Light Company. From a judgment for plaintiff, defendant brings error. Reversed and remanded.

Horsley, Kemp & Easley, for plaintiff in error.
Don P. Halsey, for defendant in error.

KEITH, P. This action was instituted in the circuit court of Campbell county by Guill, by his father and next friend, against the Lynchburg Traction & Light Company, to recover damages for an injury.

The declaration contains four counts, and there was a demurrer to it and to each count thereof, which the circuit court overruled, and a judgment was rendered upon the verdict of a jury in favor of the plaintiff for the sum of $5,000; and the case is before us for review of certain rulings made during the progress of the trial.

It is unnecessary to consider the second and third counts of the declaration, as the circuit court instructed the jury that there could be no recovery upon them.

The first error assigned is to the judgment of the court overruling the demurrer to the first count of the declaration.

It states that the defendant was the owner and operator of a certain railroad, lying in part within the county of Campbell, and along one of the public streets, roads, and highways of said county; that the railroad was being operated by means of electricity; and that the defendant so carelessly, recklessly, negligently, and improperly managed its cars that by reason of its carelessness and negligence one of them ran and struck with great force upon and against the plaintiff, who was then upon said highway, whereby his left arm was greatly bruised, broken, and mangled, so that it became necessary to amputate it above the elbow.

If, as averred in the declaration, the plaintiff was upon a public highway, his right upon it was equal to that of the railroad company, and it was bound to use the degree of care proper to that situation; and if it failed to do so, and as a result of its negligence the injury was inflicted upon the plaintiff, a case for the recovery of damages was made out. But negligence is a conclusion of law from facts sufficiently pleaded. The office of a

declaration is to inform the defendant of the case which it has to meet, so that it may have a reasonable opportunity to prepare and make its defense. It is not enough to say that the plaintiff was injured and that the injury resulted from the careless and negligent conduct of the defendant; but the facts relied upon to establish the negligence for which the defendant is to be held liable must be stated with reasonable certainty.

In Hortenstein *v.* Va.-Carolina Ry. Co., 102 Va. 914, 47 S. E. 996, this court, after a full review of the authorities, disapproved the case of B. & O. R. Co. *v.* Sherman's Adm'r, 30 Grat. 602, and approved what was said in B. & O. R. Co. *v.* Whittington's Adm'r, 30 Grat. 805, stating the law to be that, "in an action of tort founded on the negligence of the defendant, the declaration must allege what duty was owing by the defendant to the plaintiff, the failure to discharge which caused the injury complained of, and its breach, or make such averments of facts as will show the existence of the duty and its breach. These averments must be made directly and positively, and not merely by way of recital. * * * The object of a declaration is to apprise the adverse party of the ground of complaint, and in actions of tort the declaration must state sufficient facts to enable the court to say, upon demurrer, whether, if the facts stated are proved, the plaintiff is entitled to recover. A statement of a cause of action in general terms, and general averments of negligence of the defendant, which fall short of this, are not sufficient."

In Southern Ry. Co. *v.* Hansbrough, 105 Va. 527, 54 S. E. 17, the court held it to be insufficient upon demurrer, because, while it alleged that the defendant's employees carelessly, negligently, and unskillfully, with great rapidity and with great force and violence, ran one of its engines upon and against the plaintiff, thereby inflicting the injury complained of, it did not point out in what manner the defendant was negligent, nor what duty was owing from the defendant to the plaintiff, the breach of which was the cause of the alleged injury. The declaration in that case was less open to criticism, indeed, than that under consideration; for in that case it appears that the injury occurred upon the street of a city over which the train that inflicted the injury was being run at a high rate of speed; but it was considered that the mere rate of speed was not in itself per se negligence, there being no averment in that count that there was any ordinance regulating the speed of trains.

The principle announced in Hortenstein's Case, *supra,* was approved in Lane Bros. *v.* Seakford, 106 Va. —, 55 S. E. 556; Hot Springs Lumber Co. *v.* Revercomb, 106 Va. —, 55 S. E. 580, N. & W. Ry. Co. *v.* Wood, 99 Va. 156, 37 S. E. 846, and N. & W. Ry. Co. *v.* Stegall's Adm'x, 105 Va. 538, 54 S. E. 19.

Blue Ridge Light & Power Co. *v.* Tutwiler, 106 Va. —, 55 S. E. 539, considered by itself, apart from decisions which show that the court had no purpose in that case to depart from the principle of the Hortenstein Case, *supra,* or to impair or diminish its authority, might appear somewhat to relax the rule. The facts in that case constituting negligence do not, it may be conceded, sufficiently appear; but there was no intention upon the part of the learned judge who wrote that opinion, nor of those who approved it, to change or limit the rule announced in the Hortenstein Case. The conclusion reached in Blue Ridge Light & Power Co. *v.* Tutwiler, in favor of the plaintiff in error, was upon the merits of the case so plainly right that the demurrer, for that reason, may not have been scrutinized with the same caution that would have been exercised had the decision of the case ultimately rested upon the demurrer.

We are of opinion that the demurrer to the first count of the declaration should have been sustained.

The case of the defendant in error depends largely upon his contention that at the time of the injury he was upon a public highway. The accident occurred in the county of Campbell, just outside the limits of the city of Lynchburg, and therefore, in determining whether or not it was a public highway, the law is to be ascertained with respect, not to the dedication and opening of streets in a city, but to the establishment of public roads in the country.

In Kelly's Case, 8 Grat. 632, decided by the General Court at its December term, 1851, it was held that "the mere user of a road by the public, for however long a time, will not constitute it as public road. A mere permission to the public, by the owner of land, to pass over a road upon it, is, without more, to be regarded as a license, and revocable at the pleasure of the owner. A road dedicated to the public must be accepted by the county court upon its records before it can be a public road. If a county court lays off a road before used, into precincts, or appoints an overseer or surveyor for it, thereby claiming the road as a public road, and if after notice of such claim the owner of the soil permits the road to be passed over for any long time, the road may be well inferred to be a public road." That case has been frequently followed, and its authority never questioned. In Gaines *v.* Merryman, 95 Va. 660, 29 S. E. 738, it was approved by a unanimous court.

In the very recent case of Town of West Point *v.* Bland, 106 Va. —, 1 Va. App. 170, speaking with reference to the dedication of land, the court said: "There must be an intention to appropriate it to the use of the public, and the acts of the owner must be

unmistakable in purpose and decisive in character; not necessarily by deed, or in writing, yet effectually and validly made by acts or declarations. It may be express or implied, and in any conceivable way by which the intention can be manifested; but, in whatever way, it must be unequivocally and satisfactorily made. Parting with ownership is not to be presumed, and while, in case of highways and streets, a dedication may be shown by acts and declarations, they must be of such public and deliberate character as to make them generally known, and not of doubtful intention."

In Terry *v.* McClung, 104 Va. 599, 52 S. E. 355, the law is said to be well settled that "the mere user of a road by the public, for however long a time, will not constitute a public road; that a mere permission to the public by the owner of land to pass over a road upon it is, without more, to be regarded as a license, and revocable at the pleasure of the owner; that a road dedicated to the public must be accepted by the county court upon its records before it can be a public road."

The intention to dedicate a street in a city, or a road in the country, may be proved in any conceivable way by which the intention can be manifested; but, in whatever way, it must be unequivocally and satisfactorily made. With respect to the streets of a city, the acceptance may be shown by the "acts of the corporation officers, which may have the same effect as the acts of the county courts." Kelly's Case, *supra.*

Defendant in error, upon this point, relies upon the case of Buntin *v.* Danville, 93 Va. 200, 24 S. E. 830. The court there was dealing with a street in the city of Danville, and quotes from Harris' Case, 20 Grat. 833, where the court was dealing with the law applicable to streets in the city of Norfolk. What is said in Buntin *v.* Danville upon the subject of the intention to dedicate is in harmony with Town of West Point *v.* Bland, *supra*; but there are expressions in the opinion from which it might seem that the court had for the moment lost sight of the distinction made in the law between the opening of a street in a city and a highway in the country. The opinion, however, read as a whole, is not open to this criticism; for at page 205 of 93 Va., and page 831 of 24 S. E., it is said: "The road referred to had been dedicated by the owner of the soil to the public, and was used by it before he sold any of the parcels of land constituting lot 118; and in the conveyance to James M. Williams, Sr., the original grantee, under whom the plaintiffs claim, of the parcel situate on the road, W. I. Lewis, the grantor, expressly reserved the road from the operation of the conveyance. The road was also accepted, as we have seen, by the court of the county as one of its highways. Its dedication was complete, effectual, and valid."

This statement of the law is in harmony with the opinion in Town of West Point *v.* Bland, *supra.* In that case it was contended by the town of West Point that the road in controversy had been dedicated to the county of King William and accepted by it as a public road before the town of West Point was incorporated, and in respect to that contention the opinion says: "There is no record evidence of the establishment of any public highway over the land in controversy, or of the working of the same as such; and, while there is some evidence that boats took on and put off goods and passengers at or near where E street, if extended, would reach the river, prior and subsequent to the incorporation of the town, there is no evidence that there was a public road located upon the land in controversy, or worked as such, or that there ever was a well defined way over it. * * * It is clear, we think, that the town fails to show that prior to its incorporation the land in controversy had been dedicated by the owners or accepted by the county authorities as a public road." In the second place it was contended by the town that, even if this be so, after its incorporation the land in controversy was dedicated by its owner as a street and accepted as such by the town. With respect to this contention, the court says: "We are of opinion that the acts relied on in this case to show an intent to dedicate are not unmistakable in their purpose and decisive in their character, and do not establish such intent with that degree of certainty and clearness required in such cases. This being so, it is unnecessary to consider the question whether or not the acts relied on as an acceptance by the town would have been sufficient to have shown an acceptance, had it been in fact dedicated."

With respect, therefore, both to streets in cities and roads in the country, the intention to dedicate may be shown in any way by which intention can be manifested. The acceptance of the dedication may, in the case of streets, be shown by the acts of corporation officers; but the acceptance of a road, in order to impose upon the public the burden of keeping it in order, must appear as matter of record, though a formal acceptance is not necessary, and the law will be satisfied if it shall appear that the county court had laid off a road before used into precincts, or appointed an overseer or surveyor for it, thereby claiming the road as a public one.

From what we have said it follows that we do not concur with the circuit court as to the manner in which a county road may be established, and there will be no difficulty in conforming its action in a future trial to the views here expressed, and therefore we refrain from passing specifically upon the exceptions to the admissibility of evidence. The evidence was in a large degree, in-

deed, relevant and proper upon the proof as to an intention to dedicate, and the error may be said to have consisted in the conclusion of law that it was sufficient to prove the road in question to be a public highway, which is the result of dedication and acceptance, as hereinbefore stated.

There is an exception taken to an observation made by counsel for defendant in error in the argument of the case before the jury, "that they should be liberal in their verdict in favor of plaintiff, because if they found a small verdict the court could not increase the amount, but if they found a large verdict the court could reduce it to what the court thought was a proper amount."

As the case has to go back for another trial, we will merely observe that it would be far better if counsel would content themselves with asking a verdict at the hands of the jury based upon the law and the evidence, without suggestions which might serve to put in peril an otherwise righteous judgment.

There are other exceptions to the giving of certain instructions, and to the refusal of others, which we shall not now consider, because both the pleadings and the evidence upon another trial will present a different case to that now before us.

We are of opinion that the judgment of the circuit court should be reversed, and that the case be remanded for a new trial in accordance with this opinion.

Note.

The decision in this case requiring record evidence to show that a public highway was dedicated to and accepted by the county, was made the subject of an editorial in the August number of the Register. The learned editor points out that "the careless keeping of records * * *, and the burning of many of our ancient records in the Commonwealth, make it in many counties absolutely impossible" to produce any but parol evidence to prove that the road is a public one, and suggests the needed legislation to remedy this harsh rule.